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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, submitted pursuant to Commission on Human Rights resolution 1997/23

ADDENDUM

Interim report on the mission of the Special Rapporteur to Belgium

CONTENTS

	Paragraphs	Page
INTRODUCTION	1 - 5	2
I. GENERAL BACKGROUND	6 - 12	3
II. REFORM PROPOSALS	13 - 17	4
III. INTERNATIONAL STANDARDS	18 - 23	6
IV. PARLIAMENTARY COMMISSION OF INQUIRY	24 - 26	7
V. JUDICIAL ACCOUNTABILITY	27	7
VI. THE REMOVAL OF JUDGE JEAN-MARC CONNEROTTE	28 - 32	8
INTERIM CONCLUSIONS AND RECOMMENDATIONS	33 - 34	9

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Introduction

1. The present interim report concerns a fact-finding mission to Belgium undertaken from 14 to 17 October 1997 by the Special Rapporteur on the independence of judges and lawyers pursuant to Commission on Human Rights resolution 1994/41 of March 1994, as renewed by resolution 1997/23 extending the mandate for a further period of three years. This mandate calls upon the Special Rapporteur inter alia to inquire into any substantial allegations transmitted to him and report his or her conclusions thereon.

2. In his third annual report to the fifty-third session of the Commission on Human Rights, the Special Rapporteur reported on an urgent appeal sent to the Government of Belgium concerning information he had received pertaining to the ongoing demonstrations in Belgium following the dismissal of a magistrate investigating a case of child prostitution, kidnapping and murder. In this urgent appeal, the Special Rapporteur had stated that while the removal of the magistrate may have been appropriate under Belgian law as his actions called into question his impartiality in the matter, it had underscored a perception that the system by which magistrates and judges were appointed, promoted and dismissed was motivated by political and/or partisan interests. The Special Rapporteur had been informed that these political appointments had resulted in a lack of public confidence in the judicial system in Belgium. In addition, the Special Rapporteur expressed his deep concern about the media reports alleging that the judicial system in Belgium was perceived by the public as being corrupt. The Special Rapporteur further noted his appreciation of the Prime Minister's assurance that his Government would press for constitutional reforms, inter alia, to stop the appointment of magistrates on the basis of political considerations. The Special Rapporteur requested that he be kept informed of such proposals. Lastly, the Special Rapporteur suggested a meeting with the Prime Minister, the Minister of Justice and the President of the Court of Cassation during his next visit to Europe, in order to discuss the proposed reforms. (E/CN.4/1997/32, para. 79.)

3. The Special Rapporteur also reported on the response to the urgent appeal he had received from the Government of Belgium in a letter dated 11 December 1996. The information transmitted by the Government included a copy of the Belgian Constitution and a copy of the Government's proposal to revise article 151 of the Constitution. In the letter dated 11 December 1996 the Government of Belgium acceded to the request of the Special Rapporteur for a meeting in Brussels to discuss the proposal to reform the procedure for the appointment of magistrates and judges. (Ibid., paras. 80 and 81.)

4. During the course of his mission the Special Rapporteur travelled to Brussels and Neufchâteau. In Brussels the Special Rapporteur met with the following Government officials: Mr. Jean-Luc Dehaene, Prime Minister; Mr. Stefaan de Clerck, Minister for Justice; Mr. P. Marchal, First President of the Court of Cassation; Mrs. E. Liekendael, Procurator General of the Court of Cassation; and Mr. Duquesne, representative in the House of Representatives and President of the Judicial Committee of the Parliament. In Neufchâteau the Special Rapporteur met with Judge Connerotte. The Special Rapporteur also met with the following non-governmental organizations and private individuals: Mr. Koen Dewulf and Ms. Mieke Van de Putte, legal officers of the Centre for Equal Chances and the Fight against Racism; Mrs. Pensis, President of the

Association syndicale de la Magistrature; Mr. Dewolf and Mr. Peeters, Vice-Presidents of the Union nationale des Magistrats; Mr. Palmes, President of the National Commission of Magistrates; Mr. Christian Wiener, Director-General of European Centre for Missing and Maltreated Children; Mr. F. Luc Montulet of the White Committee; Mr. Pierre Olivier, President of the International Commission of Jurists, Belgian Branch; Members of the Belgian Bar Association, including Mr. Joseph Michel, Dean of the Bar Association; Mr. Paul van Malleghem, Vice-Dean; Mr. Jef van den Heuvel, Former Dean; and Mr. Theo Mineur, Director of the Belgian Bar Association; Professor De Ruiver; and Professor van Orschoven.

5. The Special Rapporteur would like to thank the Government of Belgium for the excellent cooperation and assistance it provided to him during the course of his mission. The Special Rapporteur is particularly grateful for the candid and comprehensive manner in which all Government officials with whom he met answered his questions. The Special Rapporteur would also like to thank all non-governmental organizations and individuals that provided him information and insight into a very difficult and complex situation.

I. GENERAL BACKGROUND

6. The Belgian judiciary and the administration of justice in general came under severe attack during the course of 1996 following the revelations that emerged out of the so-called Dutroux scandal, an investigation carried out into a paedophile ring. In August 1996, two young girls were found still alive by the investigating magistrate, Jean-Marc Connerotte, in the house owned by Marc Dutroux who had been arrested on 15 August in connection with the disappearance of another girl; the bodies of two other young girls, who had starved to death when Dutroux was in police custody in early 1996, were uncovered in the backyard of Dutroux's house.

7. Public outrage grew when the authorities revealed that Dutroux had been released in 1992 after serving only three years of a 13-year sentence for the rape of several other young girls. It was also revealed that the police had in fact been present at Dutroux's house while the girls were being held there, and even more damaging, that the police failed to act even though they had been informed in 1993 that Dutroux had been building cells in his home allegedly to hold girls before sending them overseas. Eventually 10 suspects were arrested in connection with the kidnappings and murders of the girls, including a police officer who was alleged to have protected the paedophile ring.

8. The crisis was further exacerbated on 16 October 1996 when the Court of Cassation ruled that the investigating magistrate who had found the two girls alive, Mr. Connerotte, was removed from the case for violating his duty under Belgian law to remain strictly neutral. This decision was based upon the fact that Mr. Connerotte had attended a fund-raising dinner for the parents of the victims, thereby calling into question his neutrality in the Dutroux case; under Belgian law it is the task of the investigating magistrate to prepare a file in support of both the defence and the prosecution. The decision of the Court of Cassation sparked off massive public demonstrations, with 250,000 to 300,000 people marching in protest in front of the Palais de Justice in Brussels.

9. These events led the Government to propose numerous constitutional reforms to address the problems within the administration of justice that were revealed by the Dutroux affair. The Minister of Justice informed the Special Rapporteur that there are currently 75 law projects ongoing.

10. Among these projects is a proposal to reform the procedure by which investigating magistrates and prosecutors are appointed. Traditionally they have been appointed by the King. Similarly, judges have been appointed by the King and the legislator in the belief that such political appointments would lead to a judiciary representative of society. It is argued that a negative consequence of this system is that it led to a judiciary dependent upon the political parties, and thus, it brought about a lack of confidence in the ability of the judiciary to apply the rule of law in an independent and impartial manner. This lack of confidence is vividly seen in the Dutroux affair and, more specifically in the removal of Judge Connerotte, where the judiciary found itself susceptible to charges of being a party to a cover-up.

11. During the mission the Special Rapporteur learnt that the judiciary has for many years complained of lack of resources. Successive Governments failed to address this problem until the Dutroux scandal and the public outcry that followed. In 1997 a sum of BF 37.1 billion, less than 2 per cent of the federal budget, was allocated for the justice system. For 1998 the allocation is increased to BF 39.1 billion, still far short of what is required. An additional amount of BF 5 billion was promised for 1998-2000.

12. It was felt that the deficiencies in the justice system exposed in the Dutroux scandal may not have happened if only the system had been given the resources it asked for earlier.

II. REFORM PROPOSALS

13. On 5 November 1996, the Chamber of Representatives proposed to amend article 151 of the Constitution, pertaining to the appointment of Justices of the Peace and Judges of the Police Tribunal and the Tribunals of First Instance, which provides that they are to be appointed by the King. According to the proposal, the Justices of the Peace, Judges of the tribunals, Conseillers of the Courts of Appeal and the Court of Cassation are to be appointed by the King, but in accordance with the law. The proposed amendment inter alia provides:

Article 151

§1 "Justices of the Peace, Court Judges and Judges of the Courts of Appeal and the Court of Cassation shall be appointed by the King as provided and in the form established by the law. Without prejudice to action by other advisory bodies, the appointment shall be made, inter alia, following a classification by an advisory body composed of judicial magistrates, appointed on their presentation by the Senate on the basis of a two thirds majority of the votes cast, and other members appointed by the Senate on the basis of a two thirds majority of the votes cast, and other members appointed by the Senate with the same majority. In the case of an appointment as judge of the Court of Appeal [or judge of

the Court of Cassation], the law also provides for the issuance of an opinion by these courts, preceding the classification referred to in the second paragraph, in the form prescribed by the law ...

§4A "A Supreme Council of Justice exists for the whole of Belgium comprising an equal representation of judicial magistrates directly elected from the judiciary, and other members appointed by the Senate on the basis of a two thirds majority of the votes cast. The law shall establish the subsequent composition and modus operandi of this Council. The Supreme Council shall issue opinions and prepare proposals, according to the conditions and in the form prescribed by the law, inter alia to the Federal Government and the Divisions, either at their request or on its own initiative, as regards the general operation of the judicial organization [and the enforcement of penalties] and shall dispose for this purpose of the means of investigation established by the law. The law shall establish a procedure to enable the Council to handle complaints concerning the general operation of the judicial organization."

14. It is important to note that the current procedure for disciplining judges is one of self-discipline. Only the Court of Cassation is able to remove judges, while the Courts of Appeal are able to otherwise discipline Conseillers, judges of the Tribunals of First Instance, the Commercial Courts, the juges consulaires, and the Justices of the Peace and the Police Tribunal. The Labour Courts may discipline the Conseillers, Conseillers Sociaux, the Judges and the juges sociaux.

15. Under the proposal, the Superior Council of the Judiciary to supervise the judiciary would be composed of 24 members, with varied experiences. Lawyers, professors and academics in the humanities, management or other relevant areas will be eligible candidates, although political representatives would be excluded.

16. The current proposals also retain the College of Nomination for Magistrates (Collège de recruitement des magistrats), which was created by the Law of 18 July 1991, article 21 (transitory disposition). The purpose of the College is to establish an objective procedure by which magistrates are nominated and appointed, thereby addressing the prior criticism of the political nature of appointments to the judiciary. Under this law the College has 22 members, who are divided into two juries, one jury for Dutch-speaking, and one for French-speaking members. Each jury is composed as follows: five magistrates, of whom three are magistrats du siège and two are from the public ministry; three university professors, who are neither magistrates nor lawyers; and three lawyers (Judiciary Code, chap. V bis, sect. 1). It is also envisaged that a system of evaluation for all permanent judges is to be put in place.

17. Another proposal is to appoint for a five-year renewable term the First President, the Procurator General, Auditor General, President, Procurator of the King, Auditor of Labour and Auditor of the Military. A candidate for these positions will have to present a "programme of action" outlining the manner in which he or she intends to exercise the function. The President and Section President of the Court of Cassation, the President

of the Chambers of the Court of Appeal, the Vice-President of the Tribunal and the Judges of Instruction, Youth Tribunal and the Tribunal of Executions will be elected either by the General Assembly and/or presented by the president of the relevant court.

III. INTERNATIONAL STANDARDS

18. Concerns were expressed to the Special Rapporteur that some of the proposals, if implemented, could undermine the independence of the judiciary. The Special Rapporteur, however, wishes to emphasize that the reform process is still under debate and that he continues to receive reports from the Government and other interested parties. Accordingly, he believes that it is premature for him to reach any final conclusions at this time on the reform process. Nevertheless, he is concerned that not enough consideration is being given to international standards for ensuring judicial independence.

19. Concerning qualifications, selection and training, Principle 10 of the Basic Principles on the Independence of the Judiciary provides the following:

> "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that such a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory."

20. The Basic Principles do not provide guidance on the preferred method for appointing judges, merely stating that any method shall safeguard against judicial appointments for improper motives. The establishment of a College of Nomination and Promotion in Belgium has certainly allowed for more objective criteria to be applied in the selection process. However, in the view of the Special Rapporteur, an important element for ensuring independence is self-administration. The Special Rapporteur is concerned that the establishment of a college in which judges are a minority may send the wrong message. This is even more applicable to the Supreme Council of the Judiciary in which judges will be a minority.

21. This concept of self-administration is even more important when considering the issue of discipline. Principle 17 of the Basic Principles on the Independence of the Judiciary provides:

> "A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge."

22. Once again, the Basic Principles do not provide specific guidance on the appropriate procedure. However, in the view of the Special Rapporteur, self-discipline should be the norm. This principle is enunciated in the Draft

Declaration on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, also known as the Singhvi Declaration. (E/CN.4/Sub.2/1988/20/Add.1.) Principle 26 (b) of this Declaration states:

> "The proceedings for judicial removal or discipline when such are initiated shall be held *before a Court or a Board predominantly composed of members of the judiciary*. The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of such a Court or Board." (emphasis added)

23. Similarly, the Minimum Standards of Judicial Independence, adopted at the International Bar Association's Nineteenth Biennial Conference held in New Delhi in October 1982, provides in article 31 that "In systems where the power to discipline and remove judges is vested in an institution other than the legislature, the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the judiciary."

IV. PARLIAMENTARY COMMISSION OF INQUIRY

24. In the aftermath of the public demonstration a Parliamentary Commission, commonly known as the Dutroux Commission, was set up to inquire into, inter alia, the deficiencies in the justice system and whether there was any political involvement or pressure exerted on the system. Several magistrates were invited to appear before the Commission. The hearing was made public and televised.

25. Several Magistrates complained to the Special Rapporteur that the way the Commission conducted its inquiry, it appeared as though they, the Magistrates, were on indictment. They felt humiliated. Some felt that it was staged to appease the public resentment for the judiciary.

26. While the Special Rapporteur has not had the opportunity to study the findings of this Commission yet he questions whether a parliamentary commission was an appropriate body to look into issues related to the judiciary in the light of the doctrine of separation of powers in government. In any event, he questions the need for the proceedings to be made public, particularly through the electronic media. The Special Rapporteur learnt that Belgium has not much experience in commissions of inquiries.

V. JUDICIAL ACCOUNTABILITY

27. The events in Belgium appear to have led to a debate on judicial accountability. While every public institution in a democracy is accountable yet in the view of the Special Rapporteur, judicial accountability should not be stretched to the extent of the kind of public accountability expected of executive and parliamentary arms of the Government. Judicial accountability stretched too far can seriously harm judicial independence. Judges are accountable to the extent of deciding the cases before them in public, fairly and of delivering the judgements promptly and giving reasons for their judgements; their judgements are subject to scrutiny by the appellate courts. If they misconduct they are subject to discipline by the mechanism provided

under the law. Beyond that they should not be accountable for their judgements or decision or action to any others. Any reform should clearly bear in mind that judicial accountability should not lead to erosion of judicial independence.

VI. THE REMOVAL OF JUDGE JEAN-MARC CONNEROTTE

28. As noted in paragraph 8 above, the event that triggered the massive street demonstrations in October 1996 was the removal of Judge Jean-Marc Connerotte from the Dutroux case following his attendance at a fund-raising dinner for the parents of the victims. The grounds for removal were based, inter alia, on the following considerations:

1. "that the impartiality of judges is a fundamental rule of the judiciary ... and that it guarantees persons on trial that judges will apply the law impartially";

2. "that the essential condition for the impartiality of the examining magistrate is his total independence vis-a-vis the parties, such that he cannot lay himself open to any suspicion of partiality in the investigation of facts, whether for the prosecution or the defence";

3. "that it is clear from a comparison of article 828 of the Judicial Code, which lists the causes of objection, and article 542 of the Criminal Investigation Code, which provides for transfer from one court to another on grounds of bias, that an examining magistrate who has been entertained by one of the parties at the latter's expense, who has accepted gifts from him or has thus shown sympathy towards that party, may consequently not continue to investigate his case without giving rise to doubts in the minds of other parties, particularly the defendants, about his ability to perform his functions objectively and impartially."

29. During the course of his mission, the Special Rapporteur had an opportunity to discuss this decison with the Procurator General, the President of the Court of Cassation and Judge Connerotte himself, as well as with other judges and government officials. Based upon these discussions and all the information available, the Special Rapporteur is convinced that the decision to remove Judge Connerotte was in light of the highest traditions of the independence and, in particular, impartiality of the judiciary. The Special Rapporteur found no evidence that there were any other ulterior motives for this decision. Despite the immense public pressure to decide otherwise, the Court faithfully applied the Rule of Law and maintained the principles of the profession.

30. While the public emotional outburst resulting in the unprecedented street demonstration was understandable under the circumstances yet the Special Rapporteur considers that the same public should have been advised of the important principle, a threshold principle in an independent justice system, which the Court of Cassation upheld in its decision. The public

should have been further advised that the right to an independent and impartial justice system is the right of all consumers of justice. It is not the right or privilege of the judges and lawyers. They, the public, should therefore safeguard this right at all cost for their own interest.

31. The Rule of Law dictates that there are times courts have to make unpopular decisions which may not find favour with the public. There will be anarchy if judicial decisions are tailored to meet the demands of street demonstrations.

32. The Special Rapporteur regrets that the Government, the media and even the organized Bar Association failed to address the public on this issue. The allegations against the Court of Cassation amidst public emotion, in the view of the Special Rapporteur, were not justified.

INTERIM CONCLUSIONS AND RECOMMENDATIONS

33. The events over the past two years in Belgium demonstrate that there is a crisis of public confidence in the administration of justice in that country. The Special Rapporteur considers that the root cause of the deficiencies in the system is the neglect of the judicial system by successive Governments. The reform process under way should restore public confidence in the administration of justice but the process must ensure that independence and impartiality are not sacrificed for short-term political gains. The judicial system should not only be independent and impartial but must be seen to be so. Hence the mechanisms for the appointments, promotions and discipline of magistrates must not only be independent but must be seen to be so. Equally any mechanism to supervise the judiciary should be independent and seen to be so. To meet this requirement, the composition of these mechanisms should have a majority of magistrates appointed or elected among themselves. Judicial accountability should not lead to an erosion of judicial independence.

34. As the Special Rapporteur noted above, the ongoing nature of the process makes it difficult for him to draw final conclusions and to make specific recommendations at this time. Accordingly, he will continue to monitor the developments and maintain the current dialogue with the Government and other concerned groups in an effort to ensure that the independence and impartiality of the judiciary is fully guaranteed. The Special Rapporteur will submit a further report to the next session of the Commission.